No. 66

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

J. B. MONTGOMERY, INC., *Appellee*

On Appeal from the United States District Court for the District of Colorado

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MOTION TO AFFIRM

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March 6, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CITATIONS

STATUTES

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v.

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On Appeal from the United States District Court for the District of Colorado

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellee, J. B. Montgomery, Inc. moves that the judgment of the District Court be affirmed on the ground that the questions presented are not sufficiently substantial to warrant further argument.

STATEMENT

This is a direct appeal from the decision and final judgment (J. S. 15, 28; 206 F. Supp. 455) of a District Court of three judges convened pursuant to 28 U.S.C. 2284 and 2325, setting aside certain orders of the Interstate Commerce Commission (Commission) as being beyond its statutory authority; and remanding the cause for further action by

the Commission in accordance with the views expressed in the opinion of the District Court.

This case arises as a result of amendments to the Interstate Commerce Act (Act) enacted by Congress in 1957. This legislation amended the definition of a "contract carrier by motor vehicle" in Section 203(a)(15) of the Act, and added Section 212(c), which provides for the revocation of a contract carrier permit of, and issuance to, any person holding a permit whose operations on the effective date of this subsection (August 22, 1957) did not conform to the amended definition of contract carriage.

Prior to 1957, appellee (Montgomery) held a contract carrier permit authorizing the operations described in App. D, J. S. 42. By an order dated January 3, 1958, the Commission instituted a proceeding under Section 212(c) to determine whether appellee's then outstanding permit should be revoked and a certificate of public convenience and necessity be issued in lieu thereof. Subsequently, as a precautionary measure, appellee filed an application for conversion from contract to common carriage.

While the Montgomery proceeding was pending on exceptions, the Commission issued its report in *T.T. Brooks Trucking Co., Inc. Conversion Application*, 81 M.C.C. 561, which embraced nine other conversion applications and served as the test case for determining issues arising under Section 212(c), including the question of whether converted authorities should continue restrictions limiting service to a particular class of shippers.[1] The Commission concluded that proceedings arising under Section 212(c) should be decided on the basis of the "substantial parity" test applied by this Court in cases arising under the "grandfather" clause of Part II of the Act, i.e. the Motor Carrier

[1] Such restrictions are referred to as "keystone" restrictions, having been first adopted by the commission in *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475.

Act of 1935,[2] and that where "Keystone" restrictions appear in the permits of converted carriers the certificate issued in lieu thereof should contain a restriction continuing the effect of the "Keystone" restrictions. As applied to Montgomery, the service was restricted, in the certificate issued, to movements from, to or between outlets or other facilities of the particular businesses of the class of shippers with which it could formerly contract (J. S. 38, 46-48).

Appellee filed a complaint in the District Court to set aside the Commission's order insofar as it limited operating authority to movements from, to or between facilities of a particular class of shippers. The District Court held that a certificate to be issued under Section 212(c) is not subject to the test of substantial parity, and that the Commission was without statutory authority to impose the restrictions in question. Accordingly, the Court set the Commission's order aside and remanded the matter for further action in accordance with the views set forth in its decision.

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court, and the decision of the District Court should be affirmed.

Before proceeding with the substance of their argument, appellants suggest that the question in this case is whether the statutory provisions authorize the Commission, in the case of a contract carrier whose commodity authority is defined not in terms of specified commodities but in terms of products customarily handled by particular types of businesses, to impose limitations upon the business facilities to be served which are designed to achieve "substantial parity" between the carriers operations under its old permit and its new certificate.

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[2] *Alton Railroad Co.* v. *United States*, 315 U.S. 15, 22; *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475.

This is less a question than a method of circular reasoning. It is well established that *common carriers* whose commodity authority is defined in terms of products customarily handled by particular types of businesses may transport these commodities for other types of business as well. In *Interstate Commerce Commission* v. *Ratner*, United States District Court for the Northern District of Illinois, Eastern Division, decided April 15, 1947, 6 CCH Fed. Car. Cas. II 80.415 (not reported in F. Supp.), it was held that a carrier holding authority to transport "such merchandise as is dealt in by wholesale food business houses" could properly transport beer from a brewery to a beer distributor under such authority because many wholesale food business houses in their normal course of business dealt in and distributed beer, even though the beer distributor in this case was not considered a wholesale food business house.[a]

In *Sanders Extension of Operations*, 47 M.C.C. 210, 214, the Commission applied this principle to a common carrier with a similar commodity description stating that so long as the commodities transported are "such as are dealt in by wholesale and retail grocery stores" the carrier was "free to transport them for any shipper or consignee regardless of the business in which he or it is engaged." To the same effect is *Vidas Contract Carrier Application*, 62 M.C.C. 106, 108.

Thus, in the last analysis, the question as stated by appellants simply resolves itself into whether the "substantial parity" test is valid under Section 212(c).

Appellants' first assertion is that the question is important in the administration of the Act. This is doubtful at best. The issue resolved by the District Court is not one

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[a] The carrier in question was a contract carrier, but its permit did not contain "Keystone" restriction limiting service to a class of shippers.

of continuing interest to either the Commission or the motor carrier industry and the effect of the decision is not prospective in nature. In contrast, the Court has had, and continues to have, before it, a number of cases involving the Commission which are of continuing interest to the industry.[4] See, for examples, *Interstate Commerce Commission* v. *J.T. Transport Company*, 368 U.S. 81 which interpreted the criteria of public interest contained in Section 209(b) of the Act; and No. 125, *United States* v. *New York, New Haven & Hartford Railroad Co., et al.* (Probable jurisdiction noted October 8, 1962, 9 L. ed. 2d 52) which involves an interpretation of the meaning of "unfair or destructive competitive practices" as used in the statement of National Transportation Policy. These decisions will undoubtedly guide the Commission and the industry for a number of years. While it may be, as contended by appellants, that there have been at least 65 conversion proceedings under Section 212(c) in which the certificates issued in lieu of permits contained provisions similar to those in the involved case, many of these carriers have no real interest in the subject and in any event, this, in and of itself, does not make the question substantial. If, as appellants contend, the lack of such a restriction would permit converted carriers to enlarge and expand their business beyond the pattern acquired prior to August 22, 1957, the answer, as the District Court found, is that the enlargement was recognized by Congress and is inherent in the language and legislative history of Section 212(c). (App. A., J.S. 24). The Commission's difficulty is not in administering the Act, but in accepting the fact that it cannot, under the guise of administration, put limitations in the statute not placed there by Congress. *Colgate Palmolive-Peet Co.* v. *N.L.R.B.*, 338 U.S. 355.

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[4] As of February 27, 1963, there were 11 cases pending before this Court involving decisions of the Interstate Commerce Commission.

Appellants next argue (J. S. 10-14) that the Commission has statutory authority to impose such restrictions, supported by the language and legislative history of the Act and the decisions of this Court interpreting the "grandfather" provisions of the Motor Carrier Act. This argument is answered effectively in the decision of the District Court (App. A, J.S. 22-23), and in the last analysis the soundness of that decision can be determined without any further proceedings before this Court.

The language of the "grandfather" clause of the Motor Carrier Act differs significantly from Section 212(c), and the decisions of this Court that the original clause was designed to insure substantial parity between future operations and prior bona fide operations are based on the language of that part of the statute. By contrast, Section 212(c) specifically states that the Commission "*shall* authorize the transportation of the *same* commodities between the *same* points or within the same territory *as authorized in the permit*". (Emphasis added).

Appellants' rely in part on two decisions of the District Court for the District of New Jersey (J. S. 11) which have little or no applicability. In *Tar Asphalt Trucking Co., Inc. v. United States*, 208 F. Supp. 611, 614, plaintiff's primary objective was to remain a contract carrier, and the substance of its complaint was that the Commission improperly found its operations to be those of a common carrier, resulting in its involuntary conversion. Plaintiff's objection to the restriction against tacking was an alternative objection in the event its conversion was found to be proper. Plaintiff argued that the restriction would amount to discrimination between it and existing common carriers who are permitted to tack, and to a denial of equal protection of the law. The Commission did not argue the point in these terms, but referred to its opinion in the *Brooks* case, *supra* and contended that the restriction was necessary to accomplish substantial parity. The Court adopted the Com-

mission's views without commenting specifically on plaintiff's contentions. The basic issue of the *validity* of the "substantial parity" test in connection with section 212(c), was not effectively developed in the case, and it is doubtful that the question, as such, was even before the Court. The jurisdictional statement of this appellant in No. 762, this Term, does nothing to recast the issues. *P. Saldutti & Son, Inc.* v. *United States*, 208 F. Supp. 611, is not in point. The issues in that case have nothing in common with those presented here and the Court's remark (quoted out of context) is dicta.

That the restriction may be viewed as an exercise of the Commission's power under Section 204(b) is certainly a questionable hypothesis. The Act provides for only two classes of for hire motor carriers, contract and common, and any classification or grouping which the Commission is authorized to establish must fall within these two classes. It has no authority to create a hybrid class of carriers which is something more than contract carriers and something less than common carriers. Since the basic purpose of Congress was to permit contract carriers whose activities did not conform with the new definition of contract carriage to continue their existing operations as common carriers, they should have the same rights, and accompanying duties, as other common carriers. The basic fallacy with appellants' reasoning is that they would label converted carriers as common carriers for convenience, but would have them continue to operate with the same restrictions which attached to their former status as contract carriers. While appellee considers the appellants' position in this respect to be untenable, it should be noted that this point was not raised timely by appellants before the District Court, and, in our view should not be considered. *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33.

The suggestion that it is not unreasonable to read into Section 212(c) by implication the provisions of Section

208(c) (J.S. 14) is far-fetched to say the least. Section 208(c) by its very terms refers only to certificates issued under Sections 206 or 207; and neither the language nor the legislative history of Section 212(c) remotely suggests that Congress intended Section 208(c) to be applied in connection with Section 212(c).

In answer to the remainder of appellants' arguments, it should be emphasized that while the District Court recognized that a possible broadening of the activities of a converted carrier is inherent in the language and legislative history of Section 212(c), it also recognized that the Commission had applied this section to impose territorial restrictions beyond those contained in the permit. For example, as pointed out to the District Court, appellee as a contract carrier under contracts with wholesale and retail department stores was authorized to transport any commodity dealt in by its contracting shippers from to or between any point within its authorized territory, irrespective of whether the movement was from, to or between a facility of a wholesale or retail department store. As a common carrier, however, it would be limited, even when serving a wholesale or retail department store, "to shipments moving from, to or between wholesale or retail department stores". Thus, as examples, appellee as a common carrier, under the restrictions imposed by the Commission, would be prevented, among other things, from performing any service from a supplier of a department store to its customer, from a public warehouse to a customer, from one public warehouse to another public warehouse, or from a supplier or public warehouse to a consolidation or transfer point. The restrictions imposed on the other converted authorities of appellee have the same diminishing effect. Actually, the restriction can act as both a commodity and territorial limitation, and as such deprives appellee of a substantial right which it held prior to conversion. The Commission cannot apply Section 212

(c) to deprive a carrier of rights held prior to its conversion under any theory of statutory interpretation.

It is regrettable, but true, that the Commission on the basis of alleged legislative intent has consistently and erroneously tried to over-regulate contract carriers. From this standpoint it has usually been proven wrong. In fact, the impetus for the 1957 amendments came from this Court's decision in *United States* v. *Contract Steel Carriers*, 350 U.S. 409. Prior to this decision the Commission regarded the legitimate purpose of a contract carrier as being to furnish a specialized and individual service which is required by the peculiar needs of a particular shipper and which a common carrier, because of its obligations to the general public, could not undertake to supply. *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475, 498; *Craig Contract Carrier Application*, 31 M.C.C. 705, 712. Ultimately, the Commission arrived at the conclusion that specialization in respect to shippers served was evidenced or negatived by the number served. *Transportation Activities of Midwest Transfer Co.*, 49 M.C.C. 383, 396. In *United States* v. *Contract Steel Carriers*, *supra*, this Court found that if specialization was to be read into Section 203(a)(15), it was satisfied that the service was specialized, since the carrier was authorized to haul only a limited types of steel products and did so under individual and continuing contractual arrangements with a comparatively small number of shippers (69) throughout a large area. It specifically held that "A contract carrier is free to aggressively search for new business within the limits of his license."

After the 1957 amendments, the Commission attempted to perpetuate its practice of denying contract carrier applications under Section 209(b) on the basis of the adequacy of existing common carrier service. In *Interstate Commerce Commission* v. *J. T. Transport Company*, *supra*, this Court ruled that the Commission's approach was improper,

and that the standard under the amended version of this section was not whether existing services are reasonably adequate, but whether a shipper has a distinct need for a different or more select service. The case was remanded for further consideration. While the Commission is often regarded as one of the most able administrative agencies, it also has a history of resisting legislative change, and its attempts to circumscribe contract carriage have met with numerous judicial rebuffs.

The arguments advanced by appellants are designed to overcome past failures to recognize and accept legislative change. The Commission has never quite accepted the 1957 amendments as a change, but has tended to regard them as merely an affirmation of its practices. While this Court has not had occasion to pass on a case arising under Section 212(c), it has recognized that these amendments were intended to and did change the status quo, and this view is implicit in the District Court's opinion.

The question presented is one of statutory interpretation. Although the legislation involved is important, the questions presented are not so substantial as to warrant further consideration by this Court. In amending the Act, Congress expressed itself clearly, and set forth definite standards for converting contract carriers who did not meet the amended definition. Instead of following the language and legislative intent of the statute, the Commission erroneously has attempted to interject its own standards; and the District Court has clearly recognized this fact. The District Court has interpreted the statute involved in accordance with well established principles of statutory construction. In our opinion, no novel or unusual questions are presented to this Court, such as would require further argument.

We respectfully submit that the decision below is correct, and that appellants present no substantial question for the

decision of this Court. The judgment of the District Court should be affirmed.

Respectfully submitted,

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March 6, 1963

Proof of Service

I, CHARLES W. SINGER, attorney for J. B. Montgomery, Inc., appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the fifth day of March, 1963, I served copies of the foregoing Motion to Affirm on the several parties thereto, as follows:

1. On the United States by mailing copies in duly addressed envelopes with first class postage prepaid, to the Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C.; Lee Loevinger, Esq., Assistant Attorney General, Department of Justice, Washington 25, D. C.; Robert B. Hummel, Esq., Attorney, Department of Justice, Washington 25, D. C., Elliott H. Moyer, Esq., Attorney, Department of Justice, Washington 25, D. C., and Arthur J. Murphy, Jr., Esq., Attorney, Department of Justice, Washington 25, D. C.; and to Lawrence M. Henry, Esq., United States Attorney for the District of Colorado, Denver, Colorado, with air mail postage prepaid.

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Robert W. Giannane, Esq., its Chief Counsel, Interstate Commerce Commission, Washington 25, D. C., and Betty Jo Christian, Attorney, Interstate Commerce Commission, Washington 25, D. C.

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